Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: April 7, 2011 **Released: April 7, 2011**

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order and Order on Reconsideration (Order), we comprehensively revise our pole attachment rules to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.[1] The Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation.

2. Congress directed the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans" by removing barriers to infrastructure investment.[2] Congress has expressed its desire to ensure that consumers in all regions of the country have access to advanced telecommunications and information services at rates that are just, reasonable and affordable.[3] In 2009, Congress directed the Commission to develop a National Broadband Plan that would ensure that every American has access to broadband services.[4]

3. In its efforts to identify barriers to affordable telecommunications and broadband services, the Commission has recognized that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services. There are several reasons for this. First, the process and timeline for negotiating access to poles

[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010) (*2010 Order* or *Further Notice*).

[2] 47 U.S.C. § 1302(b) (section 706). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. §§ 1301 *et seq.*

[3] 47 U.S.C. § 254 (b)(1)–(3).

[4] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009) (ARRA).

varies across the various utility companies that own this key infrastructure. The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. Second, if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies; because of time constraints, cost, or the need to maintain a working relationship with the pole owner, it may not wish to pursue the enforcement process. Third, the wide disparity in pole rental rates distorts service providers' decisions regarding deployment and offering of advanced services. For example, providers that pay lower pole rates may be deterred from offering services, such as high-capacity links to wireless towers, that could fall into a separate regulatory category and therefore risk having a higher pole rental fee apply to the provider's entire network.

4. In section 224 of the Communications Act of 1934, as amended (Act), Congress directed the Commission to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[5] When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. Congress concluded that "[o]wing to a variety of factors, including environmental or zoning restrictions" and the very significant costs of erecting a separate pole network or entrenching cable underground, "there is often no practical alternative [for network deployment] except to utilize available space on existing poles."[6] Congress recognized further that there is a "local monopoly in ownership or control of poles," observing that, as found by a Commission staff report, "'public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.'"[7] Given the benefits of pole attachments to minimize "unnecessary and costly duplication of plant for all pole users," Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.[8]

5. In implementing section 224, the Commission historically relied primarily on private negotiations among pole owners and attachers and, when necessary, case-specific adjudication by the Commission, to ensure just and reasonable rates, terms, and conditions, rather than adopting comprehensive access rules. But the Commission's experience during the past 15 years has revealed the need to establish a more detailed framework to govern the rates, terms and conditions for pole attachments. The National Broadband Plan found that the cost of deploying a broadband network depends significantly on the costs that service providers incur to access poles and other infrastructure.[9] Specifically, the Plan found that the rate structure is so arcane that there has been near-constant litigation about the regulatory classification of pole attachers, and also found that the establishment of timelines has expedited the make-ready process considerably in states where timelines have been implemented.[10] Accordingly, the Commission in the May 2010 *Pole Attachment Order and Further Notice* sought comment on a proposed timeline and other concerns regarding pole access. The *2010 Order* has

[5] 47 U.S.C. § 224(b)(1).

[6] S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109.

[7] *Id.*

[8] *Id.*; *see* 47 U.S.C. § 224(b)(1), (2).

[9] OMNIBUS BROADBAND INITIATIVE, FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 109 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf (NATIONAL BROADBAND PLAN or PLAN). The Commission also found that make-ready work can be a significant source of cost and delay in building broadband networks. *Id.* at 111.

[10] PLAN at 110–11.

generated a substantial record from numerous commenters, and since that time the Commission and its staff have engaged stakeholders and state commission representatives in workshops and other forums.[11]

6. The record in this proceeding demonstrates that the current framework often results in negotiation processes that may be so prolonged, unpredictable, and costly that they impose unreasonable costs on attachers and may create inefficiencies by deterring market entry.[12] We are also persuaded by evidence in the record that widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act. Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services.[13] Therefore, to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable. At the same time, we recognize that pole owners are entitled to fair compensation for their property, and have a desire to minimize disruption to themselves and existing attachers. The record also suggests that inefficiently low rates for pole attachments could deter pole owners from deploying new poles or upgrading their poles. Thus, in this Order, we seek to eliminate unnecessary costs or burdens associated with pole attachments, while taking into account legitimate concerns of pole owners and other parties that might be affected by additional attachments.

7. We also recognize and build on the work of our state partners. In section 224, Congress recognized the important role of states in ensuring that utilities provide access to poles, ducts, conduits and rights-of-way in a manner consistent with the statute. Under the "reverse preemption" provision in section 224, states may certify that they regulate rates, terms, and conditions for pole attachments in their respective states; the Commission retains jurisdiction over pole attachments only in states that do not so certify.[14] As a result, state experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals. State efforts to date on establishing fair access rules—including timelines—have been particularly instructive as the Commission attempts to balance the needs of communications companies to deploy vital network facilities with the needs of utility pole owners, including the need to protect safety of life and the reliability of their own critically important networks.

8. Based on the record received in response to the *Further Notice*, we now adopt rules establishing a specific timeline for access, improvements to our enforcement process, a revised formula

[11] *See infra* para. 18.

[12] *See, e.g.*, Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 18, 2011) (arguing that the misallocation of resources results in inefficiency in the market; conversely, with improved regulatory certainty, "an estimated 2,500 to 5,000 additional wireless attachments may be deployed annually").

[13] *See* Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 31, 2011) (stating that the number of Distributed Antenna Systems ("DAS") nodes in operation could double to 20,000 by the end of 2012 and estimating a total of 150,000 by 2017; cumulative capital expenditures by DAS providers could double by the end of 2012, with an estimated total of over $15 billion by 2017); *see also* Letter from Brian M. Josef, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 17, 2011) ("[T]he Commission has recognized that 'the deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation' and that commercial and public safety communications 'depend on the presence of sufficient wireless towers.'") (citations omitted).

[14] 47 U.S.C. § 224(b), (c). The statute also exempts poles owned by municipalities, cooperatives, and non-utilities. 47 U.S.C. § 224(a)(1). Twenty states and the District of Columbia have certified that they directly regulate utility-owned infrastructure in their regions. *See* App. C; *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541, 5541–42 (WCB 2010).

for the telecommunications access rate, and a process to ensure just and reasonable rates, terms and conditions for pole attachments by incumbent LECs. In particular, this Order takes the following actions:

- **Timeline.** The Order establishes a four-stage timeline for attachment to poles, with a maximum timeframe of up to 148 days for completion of all four stages: survey (45 days), estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days). The Order applies this timeline to requests for attachment in the communications space on a pole—for both wireline and wireless attachments. As a remedy in cases where the survey or make-ready work is not completed on time, attachers are permitted to engage utility-approved independent contractors to do the work. This self-effectuating remedy—based on a successful model that has been working in the State of New York for several years—is balanced by limitations on the number of poles per month that may be subject to the timeline, and the ability of the utility to temporarily stop the clock for legitimately exceptional circumstances. We adopt a modified timeline for wireless attachments above the communications space, for which we provide a total of up to 178 days and a complaint remedy. We also adopt longer timelines for requests to attach to a large number of poles (more than 300 poles or 0.5 percent of a utility's total poles within a state, whichever is less), for which we provide an additional 15 days for survey and 45 days for make-ready, for a total of up to 208 days for attachments in the communications space and 238 days for wireless attachments above the communications space.
- **Attachments.** We also conclude that if an electric utility rejects a request for attachment of any piece of equipment, it must explain the reasons for such rejection—and how such reasons relate to capacity, safety, reliability, or engineering concerns[15]—in a way that is specific with regard to both the type of facility and the type of pole. We further conclude that section 224 allows attachers to access the space above what has traditionally been referred to as "communications space" on a pole, but only using workers that are qualified to work above the communications space.[16]
- **Rates.** The Order reinterprets the telecommunications rate formula for pole attachments consistent with the existing statutory framework, thereby reducing the disparity between current telecommunications and cable rates. Specifically, different interpretations of the term "cost" in section 224(e) yield a range of rates from the existing fully allocated cost approach at the high end to a rate closer to incremental cost at the low end. Balancing the Commission's broadband goals with the interest in continued pole investment, we adopt a definition of cost that yields a new "just and reasonable" telecommunications rate. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The Order also confirms that wireless providers are entitled to the same rate under the statute as other telecommunications carriers.
- **Incumbent LEC Attachments.** Historically, incumbent LECs owned roughly as many poles as electric utilities, and were able to ensure just and reasonable rates, terms, and conditions for pole attachments by negotiating "joint use" agreements. Given evidence in the record about current market conditions, however, we identify a need for targeted Commission oversight to ensure just and reasonable rates, terms, and conditions that might not otherwise result from negotiations standing alone. Revisiting our prior interpretation of the statute, we allow incumbent LECs to file pole attachment complaints if they believe a particular rate, term or condition is unjust or unreasonable, and provide guidance regarding the Commission's approach to evaluating those complaints and what the appropriate rate may be (whether the new telecommunications rate or another rate).

[15] *See* 47 U.S.C. § 224(f)(2).

[16] 47 U.S.C. § 224.

- **Enforcement.** The Order adopts several measures to encourage negotiated resolution of pole attachment disputes, including a requirement that the complainant engage or attempt to engage the other party in good faith "executive-level discussions" prior to the filing of a complaint at the Commission. The Order declines to amend the "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement where the attacher claims it was coerced to accept those terms in order to gain access. The Order also declines to adopt rules for compensatory damage awards at this time. The Order also removes the cap on penalties for unauthorized attachments and clarifies that Oregon's approach to penalties for unauthorized attachments (which includes per-pole penalties, notice requirements, and a "joint use forum" for resolving disputes) is a reasonable model for contract terms in pole attachment agreements. Further, this Order encourages pre-planning and coordination among pole owners and attachers to the greatest extent, and as early in the process, as possible. To encourage such pre-planning and coordination, any enforcement proceedings will include consideration of such communication between the parties.
- **Reconsideration Issues.** The Order resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques. Among other things, we clarify that a utility's use of an attachment technique in the electric space does not obligate it to allow the same technique in the communications space; and that there is not "insufficient capacity" simply because a utility must rearrange its electric facilities to accommodate an attachment.
- **Proposals Not Adopted.** The Order declines to adopt proposed requirements regarding the collection and availability of information about the location and availability of poles, as well as proposed rules regarding a schedule of charges, phased payment for make-ready work, and the designation of a single managing utility for jointly owned poles. However, we clarify and emphasize that we do expect joint owners to coordinate and cooperate with each other and with requesting attachers in order to meet their independent obligations to successfully implement the timeline for pole attachments that we adopt today.

II. BACKGROUND

9. In 1978, Congress added section 224 to the Communications Act of 1934, as amended (Communications Act or Act) thereby directing the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable.[17] Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state.[18] Section 224 also withholds from the Commission jurisdiction to regulate attachments where the utility is a railroad, cooperatively organized, or owned by a government entity.[19]

10. The Telecommunications Act of 1996 (1996 Act)[20] expanded the definition of pole attachments to include attachments by providers of telecommunications service,[21] and granted both cable systems and telecommunications carriers[22] an affirmative right of nondiscriminatory access to any pole,

[17] Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

[18] 47 U.S.C. § 224(c); *see* App. C (listing the states that have certified that they regulate pole attachments).

[19] 47 U.S.C. § 224(a)(1).

[20] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

[21] 47 U.S.C. § 224(a)(4).

[22] For purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers." 47 U.S.C. § 224(a)(5).

duct, conduit, or right-of-way owned or controlled by a utility.[23] However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.[24] Besides establishing a right of access, the 1996 Act set forth section 224(e) — a rate methodology for "attachments used by telecommunications carriers to provide telecommunications services" — in addition to the existing methodology in section 224(d) for attachments "used by a cable television system solely to provide cable service."[25]

11. The Commission implemented the new section 224 access requirements in the *Local Competition Order*.[26] At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis.[27] Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules.[28] The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions.[29] The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but, rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights.[30] The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition*

[23] 47 U.S.C. § 224(f)(1). As a general matter, all references to poles in this Order refer to attachments to utility poles and do not include other components of the statutory definition of "pole attachments," including ducts, conduits and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

[24] 47 U.S.C. § 224(f)(2); *see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16080–81, paras. 1175–77 (1996) (*Local Competition Order*) (subsequent history omitted) (extending the provisions of section 224(f)(2) to other utilities).

[25] *See* 47 U.S.C. § 224(d) (describing the "cable rate formula"), (e) (describing the "telecom rate formula").

[26] *Local Competition Order*, 11 FCC Rcd at 15499.

[27] *Id.* at 16067–68, para. 1143.

[28] *Id.* at 16068–69, paras. 1145–46 (finding that the NESC's depth of detail and allowance for variables make it unworkable for setting access standards).

[29] *Id.* at 16068–69, paras. 1147–48 (finding that the Federal Energy Regulatory Commission (FERC) and the Occupational Safety and Health Administration (OSHA) regulations, and utility internal operating standards reflect regional and local conditions as well individual needs and experiences of the utility).

[30] *Id.* at 16058–107, paras. 1119–240 (Part XI.B. "Access to Rights of Way").

Order.[31] The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.[32]

12. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.[33] The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate.[34] The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles.[35] Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court.[36] In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.[37] The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.[38]

13. On November 20, 2007, the Commission issued the *Pole Attachment Notice*[39] in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks.[40] USTelecom argued

[31] *Id.* at 16071–74, paras. 1151–58. The five specific rules are: (1) a utility may rely on industry codes, such as the NESC, to prescribe standards with respect to capacity, safety, reliability and general engineering principles; (2) a utility will still be subject to any federal requirements, such as those imposed by FERC or OSHA, which might affect pole attachments; (3) state and local requirements will be given deference if not in direct conflict with Commission rules; (4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and (5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services. *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20198–99, para. 9 (2007) (*Pole Attachment Notice* or *NPRM*) (noting the Commission's establishment of access rules in the *Local Competition Order* and determination to revisit them if needed).

[32] *See Local Competition Order*, 11 FCC Rcd at 16068, para. 1143 ("We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services.").

[33] *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (*1998 Implementation Order*), *aff'd in part, rev'd in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power v. FCC*), *rev'd, Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

[34] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[35] *See id.* at 6797–99, paras. 36–42 (applying the definitions of "telecommunications carriers," "telecommunications services," and relevant provisions of section 224 to wireless carriers).

[36] *See Gulf Power v. FCC*, 208 F.3d at 1273–75 (wireless), 1275–78 (cable rate); *Gulf Power*, 534 U.S. at 333–39 (cable rate), 339–342 (wireless).

[37] *See Gulf Power*, 534 U.S. at 336, 338–89. The Court rejected the view that "the straightforward language of [section 224's] subsections (d) and (e) establish two specific just and reasonable rates [and] no other rates are authorized." *Id.* at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

[38] *See Gulf Power*, 534 U.S. at 341.

[39] *Pole Attachment Notice*, 22 FCC Rcd 20195.

[40] *See* United States Telecom Association, Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005) (USTelecom Petition); Fibertech Networks, LLC, Petition for Rulemaking, RM-11303 (filed Dec. 7, 2005) (Fibertech Petition). The records generated by both petitions were incorporated by reference. *Pole Attachment Notice*, 22 FCC Rcd at 20200, para. 12 n.12.

that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they are not included in the term "telecommunications carriers" and therefore have no statutory right of access.[41] Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work,[42] use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns.[43] The *Pole Attachment Notice* sought comment on the concerns raised by USTelecom and Fibertech, as well as the application of the telecommunications rate to wireless pole attachments[44] and other pole access concerns.[45]

14. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability.[46] On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.[47] Accordingly, the Plan included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.[48]

15. On May 20, 2010, the Commission issued the *Pole Attachment Order and Further Notice*.[49] In the *2010 Order*, the Commission took initial steps to clarify the rules governing pole attachments and to streamline the pole attachment process. The Commission clarified the statutory right of communications providers to use the same space- and cost-saving techniques that pole owners use, such as placing attachments on both sides of a pole ("boxing"), and established that providers have a statutory right to timely access to poles.[50] In the *Further Notice*, the Commission sought comment on a variety of measures to speed access to poles. The Commission proposed a comprehensive timeline for all wired pole attachment requests[51] and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments.[52] The Commission proposed to permit attachers to use independent contractors to perform surveys and make-ready work if the pole owner missed its deadlines, subject to certain conditions.[53] The Commission

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[41] *Pole Attachment Notice*, 22 FCC Rcd at 20205, para. 24; 47 U.S.C. § 224 (a)(5) (excluding incumbent local exchange carriers from the definition of "telecommunications carrier"); 47 U.S.C. § 224(a)(4) (defining "pole attachment" to include attachments by "any . . . provider of telecommunications service"); 47 U.S.C. § 224 (b)(1) (requiring the Commission to regulate pole attachments).

[42] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999) (*Local Competition Reconsideration Order*).

[43] *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37.

[44] *Id.* at 20209, para. 34.

[45] *Id.* at 20211, para. 38.

[46] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

[47] NATIONAL BROADBAND PLAN at 109.

[48] *Id.* at 109–13.

[49] *2010 Order and Further Notice*, 25 FCC Rcd 11864.

[50] *2010 Order*, 25 FCC Rcd at 11879–84, paras. 8–18.

[51] *Further Notice*, 25 FCC Rcd at 11876–85, paras. 25–45.

[52] *Id.* at 11885–89, paras. 46–54.

[53] *Id.* at 11891–94, paras. 61–68.

further proposed that utilities may deny access by contractors to work among the electric lines.[54] In addition, the Commission proposed a staggered payment system for make-ready work; proposed requiring a schedule of make-ready charges; proposed requiring joint pole owners to designate a single managing utility; and sought comment on improving the collection and availability of data.[55]

16. The Commission also sought comment on whether current rules governing pole attachment complaints create appropriate incentives for parties to settle or resolve disputes informally, and whether appropriate remedies are available when parties pursue formal complaints.[56] The *Further Notice* sought comment on ways to reduce the existing disparities in pole rental rates and proposed to address those disparities by reinterpreting the telecom rate formula and by considering the issues surrounding possible regulation of pole attachments by incumbent local exchange carriers (LECs).[57]

17. On September 2, 2010, various electric utilities and cable providers filed petitions seeking clarification or reconsideration of parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques.[58] The petitions ask the Commission to clarify, among other things, whether a utility must allow attachers to use the same attachment techniques that it uses for itself in the electric space, and whether a pole owner is free to impose new boxing and extension arm requirements going forward.[59]

18. The Commission has held workshops addressing pole attachment issues. On September 28, 2010 the Wireline Competition Bureau convened a workshop to "learn from the experiences and insights of state regulators regarding the Commission's proposed pole attachment regulations."[60] On February 9, 2011, the Commission held a Broadband Acceleration Conference that brought together leaders from federal, state, and local governments; broadband providers; telecommunications carriers; tower companies; equipment suppliers; and utility companies to identify opportunities to reduce regulatory and other barriers to broadband build-out.[61] At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in

[54] *Id.* at 11894–95, para. 69.

[55] *Id.* at 11895–97, paras. 70–77.

[56] *Id.* at 11898–09, paras. 78–109.

[57] *Id.* at 11909–27, paras. 110–48.

[58] Coalition of Concerned Utilities, Petition for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Coalition Petition); Florida Investor-Owned Electric Utilities, Petition for Reconsideration and Request for Clarification, GN Docket No. 09-51 (filed Sep. 2, 2009) (Florida IOUs Petition); Oncor Electric Delivery Company LLC, Petition for Reconsideration and Request for Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010); Alabama Cable Telecommunications Ass'n, Bresnan Communications, Broadband Cable Ass'n of Pennsylvania, Cable America Corp., Cable Television Ass'n of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Ass'n, Ohio Cable Telecommunications Ass'n, Oregon Cable Telecommunications Ass'n, and South Carolina Cable Television Ass'n, Petition for Reconsideration or Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Cable Providers Petition); *see 2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

[59] *See* Coalition Petition at 2–3; Florida IOUs Petition at 2–3.

[60] *Wireline Competition Bureau Announces September 28, 2010 Pole Attachments Workshop*, 25 FCC Rcd 13108 (WCB 2010). Forty-nine representatives of 32 electric utilities and their trade associations met with Federal Communications Commission staff to discuss issues of concern to utility pole owners. *See* Letter from Thomas B. Magee and Jack Richards, Counsel for the Coalition of Concerned Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Nov. 17, 2010).

[61] *FCC to Hold Broadband Acceleration Conference*, Public Notice, DA 11-241 (rel. Feb. 8, 2011).

Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.[62]

III. IMPROVED ACCESS TO UTILITY POLES

19. We take several steps to improve access to utility poles. Our rules are generally consistent with proposals in the *Further Notice*, but also reflect a close examination of the record developed in this proceeding.[63] We adopt a four-stage timeline that provides a maximum of 148 days for attachers to access the communications space on utility poles. For wireless attachments above the communications space, we adopt a modified form of the timeline.[64] The timeline begins to run after the requester submits a complete application. We also establish that a utility may stop the clock for emergencies pursuant to a "good and sufficient cause" standard. We adopt rules that allow attachers to use independent contractors pre-authorized by the utilities to complete survey and make-ready work in the communications space, subject to a number of protections and conditions, if the pole owner does not meet the prescribed timelines. In particular, electric utilities have ultimate decision-making authority regarding the contractor's work with respect to section 224(f)(2) denial-of-access issues. We allow a utility to limit on a per-state basis the size of a pole attachment request that is subject to the timeline, and allow extra time for large orders. Specifically, we apply the basic timeline to requests of up to 300 pole attachments per state or attachments to 0.5 percent of the utility's in-state poles, whichever is less. For larger requests of up to 3,000 pole attachments per state or 5 percent of the utility's in-state poles, whichever is less, additional time is provided for survey and make-ready. Utilities may treat multiple in-state requests from a single attacher during a 30-day period as one request. Our rules further provide that any denial of a request to attach must cite with specificity the particular safety, reliability, engineering, or other valid concern that is the basis for denial. We clarify that blanket prohibitions on pole top access are not permitted. And, as noted elsewhere in this Order, we encourage a high degree of pre-planning and coordination between attachers and pole owners, to begin as early in the process as possible.

20. We decline to adopt several proposals set forth in the *Further Notice* or that commenters recommend, and explain those decisions. For example, we determine that the timeline will provide adequate incentives for joint owners of poles to coordinate, and thus do not require joint owners to name a single management entity. We also conclude that several subsections of section 224 provide the Commission with sufficient authority to adopt a timeline and other access rules.

A. Timeline for Section 224 Access

1. Stages of the Timeline

21. We find that adopting a specific timeline for processing pole attachment requests will give necessary guidance to both pole owners and attachers. Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays.[65] Moreover, having a specific

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[62] *The FCC's Broadband Initiative: Reducing Barriers to Spur Broadband Buildout*, Public Notice (rel. Feb. 9, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A2.pdf; *see* Julius Genachowski, Chairman, FCC, *Remarks at Broadband Acceleration Conference* (Feb. 9, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf.

[63] *See infra* para. 21 (discussing the record evidence regarding adoption of a timeline).

[64] The modified timeline for access to poles above the communications space adopted in this Order applies solely to wireless attachments because the record in this proceeding does not demonstrate any need for a timeline for non-wireless attachments above the communications space. Thus, issues regarding wireline attachments above the communications space are beyond the scope of this Order.

[65] *See, e.g.*, Fibertech/KDL Comments at 8 (citing an increase of 159 customers per year after NY adopted a timeline at an average of 100 days from application submission to licensing, contrasted with MD where applications average over 250 days); Letter from Michael P. Miller, CEO, Fiberlight LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Feb. 23, 2011) (Fiberlight Feb. 23 *Ex Parte* Letter) (citing examples of (continued....)

timeline offers certainty to attachers and allows them to make concrete business plans.[66] Beyond generalized problems caused by utility lack of timeliness from initial request through completion,[67] the record shows pervasive and widespread problems of delays in survey work,[68] delays in make-ready performance,[69] delays caused by a lack of coordination of existing attachers,[70] and other issues.[71] Adopting a specific timeline will also generate jobs and help to move large broadband projects forward more expeditiously, including those providing broadband to schools under the E-rate program.[72]

(Continued from previous page)
network deployment significantly delayed by failure to timely attach to poles); Letter from Clifford K. Williams, Director—Regulatory & Compliance, Sidera Networks, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11303, RM-1293, at 1–2 (filed Mar. 11, 2011) (Sidera Mar. 11, 2011 *Ex Parte* Letter) (citing delays of up to 2 years); Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 3–4 (filed Mar. 2, 2011) (PCIA Mar. 15 *Ex Parte* Letter) (describing specific obstacles, including delays, faced by wireless providers); Letter from Jennie P. Chandra, Senior Counsel, Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 at 1 (filed Mar. 31, 2011) (Windstream Mar. 31, 2011 *Ex Parte* Letter) ("One of the greatest challenges Windstream has faced in deploying fiber is the lengthy, unpredictable, and costly make-ready process. It is not uncommon for a fiber deployment project to be delayed by *one or two years* simply because of make-ready issues."). Unless otherwise noted, all comments are in response to the *Further Notice*. A list of commenters is provided in Appendix C.

[66] *See, e.g.*, Alpheus and 360networks *NPRM* Comments at 2 (arguing that unknown make-ready intervals make it extremely difficult to introduce services or promise timely delivery on potential sales); Cavalier *NPRM* Comments at 6 (arguing for predictability with regard to make-ready because potential customers will not engage a service without knowing whether it will begin receiving the service in months or in years).

[67] *See, e.g.*, TWTC *NPRM* Comments at 15 ("Pole owners often wait months or even years after receiving an initial application to complete make-ready work, and these delays are exacerbated by the pole owners' refusal to permit a mutually agreed upon third party to perform the make ready work."); Cavalier *NPRM* Comments at 6 (stating that some utilities provide Cavalier access within three months after receiving an application, but others take more than five times as long); Alpheus *NPRM* Comments at 2 (complaining that the length of time for completion of make-ready varies significantly); Letter from Jean L. Kiddoo, counsel to MetroPCS Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 3 (filed Mar. 30, 2011) (stating that a significant hurdle with the issue of delay is that "most pole owners reject the notion of having any timeline in any circumstance").

[68] *See, e.g.*, Comments of Indiana Fiber Works, RM-11303 (filed Jan. 30, 2006) (noting that it has experienced serious delays involving its applications to one of the principal pole owners in its service area, often exceeding 45 days); Sigecom Comments, RM-11303, at 4 (filed Jan. 27, 2006) (citing mediation on delayed pre-construction survey to confirm Fibertech's allegation that pole owners frequently do not meet the 45-day time frame set forth in the Commission's rules).

[69] *See, e.g.*, PCIA Mar. 2, 2011 *Ex Parte* Letter at 4 (reporting that after months of negotiation, one utility provided a distributed antenna system (DAS) provider with make-ready estimation of 260 days for the installation of 20 DAS nodes); *id.* at 4 (reporting that Windstream has refused to agree to make-ready timelines for wireline and wireless attachments, as has Frontier in Minnesota); Crown Castle *NPRM* Comments at 7 (asserting that make-ready work can take up to a year to complete when completed by the pole owner's internal personnel, often because of difficulty in scheduling of crews in the field); Montgomery and Anne Arundel Counties Reply at 4 (asserting that recent experience with broadband deployments requiring pole attachments has been that the make-ready work performed by utility pole owners typically takes up to a year to complete, can take up to eighteen months in many cases, and is especially slow for larger deployments).

[70] *See, e.g.*, Sidera Mar. 11, 2011 *Ex Parte* Letter at 4.

[71] Current Group *NPRM* Comments at 3 (complaining that utilities often seek to delay potential competitors' market entry by forcing them to engage in disputes over well-settled issues).

[72] FiberLight Feb. 23, 2011 *Ex Parte* Letter at 2 ("With a pole attachment timeline in place consistent with that proposed by the Commission, FiberLight would be able to provide between 4–5 times as many construction projects thus creating more jobs and serving more areas."); Windstream Mar. 31, 2011 *Ex Parte* Letter at 3 ("Time and (continued....)

22. As shown in Tables 1 (for attachments in the communications space) and 2 (for wireless attachments above the communications space), the timeline features four stages:

- Stage 1: Survey. During the 45-day survey phase, the pole owner conducts an engineering study to determine whether and where attachment is feasible, and what make-ready is required. (This period has an additional 15 days for large orders as defined below.)[73]

- Stage 2: Estimate. The pole owner provides an estimate of the make-ready charges within 14 days of receiving the results of the engineering survey.

- Stage 3: Attacher Acceptance. The attacher has up to 14 days to approve the estimate and provide payment.

- Stage 4: Make-Ready. The pole owner must notify any attachers with facilities already on the pole that make-ready for a new attacher needs to be performed within 60 days (or 105 days in the case of larger orders, as defined below).[74] In most cases, any required make-ready work will be completed within this period, but we provide for additional time in certain circumstances. For wireless attachments above the communications space, we adopt a longer make-ready period of 90 days (or 135 days in the case of larger orders), based on safety considerations and the fact that, at present, there is less experience with application of timelines to wireless attachments at the pole top.[75] Finally, an owner may take 15 additional days after the make-ready period runs to complete make-ready itself.

23. For most attachments, the total time from submission of the request through completion of make-ready should take between 105 and 148 days, depending on how long the parties take to prepare and accept an estimate.[76] Attachers may hire contractors authorized by the utility to complete make-ready either on the 133rd or 148th day, depending on whether an owner timely notifies the attacher that it intends to move existing facilities and conduct make-ready if existing attachers have failed to move their attachments. Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted. Likewise, for large orders, we allow 15 more days for the survey and 45 more days to complete make-ready.

(Continued from previous page)
again, KDL's fiber deployment efforts for schools, like cell towers, have been stalled for many months by delays in the make-ready phase of its projects.").

[73] *See infra* para. 63.

[74] *See infra* para. 63.

[75] *See* Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Mar. 15, 2011) (PCIA Mar. 15 *Ex Parte* Letter) (indicating that Utah's total timeline applicable to wireless attachments for fewer than 300 poles ranges from 165 to 180 days, and Vermont's total timeline for up to 0.5% of a utility's poles is 180 days); Letter from Brian M. Josef, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 4 (filed Mar. 15, 2011) (CTIA Mar. 15 *Ex Parte* Letter) (noting timelines in Utah and Vermont and stating that "[m]ore states are progressing in the same direction, taking steps to ensure wireless attachers have access to poles, and specifically access to the pole top").

[76] *See supra* para. 22 (describing the various stages of the timeline and their respective lengths). For wireless attachments above the communications space, the relevant end point of the timeline is 178 days rather than 148 days.

Access Timeline for Pole Attachment in the Communications Space

	Stage			
	Survey	**Estimate**	**Acceptance**	**Make-Ready**
Day:	0 45	59	73	133-148
Stage in days:	45	14	14	
Owner Duty	• Conduct engineering survey.	• Provide cost estimate for make-ready.		• Give existing attachers 60 days notice. • Prepare poles if necessary. • Work with existing attachers' contractors.
Attacher Remedy	• Hire contractor to conduct survey (for attachments in the communications space).	• File complaint with Commission		• Hire contractor to perform make-ready.
Clock		• Parties may stop clock if no master agreement.		• Pole owner may stop clock for good and sufficient cause.

Table 1

Access Timeline for Wireless Pole Attachment Above the Communications Space

	Stage			
	Survey	**Estimate**	**Acceptance**	**Make-Ready**
Day:	0 45	59	73	163-178
Stage in days:	45	14	14	
Owner Duty	• Conduct engineering survey.	• Provide cost estimate for make-ready.		• Give existing attachers 90 days notice. • Prepare poles if necessary. • Work with existing attachers' contractors.
Attacher Remedy	• File complaint with Commission.	• File complaint with Commission.		• File complaint with Commission.
Clock		• Parties may stop clock if no master agreement.		• Pole owner may stop clock for good and sufficient cause.

Table 2

24. *Stage 1 - Survey*: 45 days. We require a utility to respond within 45 days of receipt of a complete application to attach facilities on the utility's poles—for both wireline and wireless attachments either in or above the communications space. This required response is specified in our current 45-day response rule, which provides that, where a utility denies an attachment request, it must provide a written explanation of its denial that is specific; include all supporting evidence and information; and explain how the evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standards.[77] The 45-day period also accords with the "survey" period in some state models and a proposal in the record.[78] Indeed, the *Further Notice* stated that "[the 45-day response] rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally

[77] 47 C.F.R. § 1.1403(b).

[78] Case 03-M-0432—Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, at 3–4 (New York Comm'n, rel. Aug. 6, 2004) (New York Order); *Re The State's Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13, at 17 (Dept. of Pub. Util. Control, Apr. 30, 2008); Coalition Proposal at 1.

understood by utilities as such."[79] No commenter disagrees, and most utilities regularly meet this deadline. According to a Utilities Telecom Council survey of its members, utilities meet the 45-day requirement 81 percent of the time.[80] More than half of the missed deadlines are caused by either the size of the project or errors in the application.[81] Our new rules address both of these problems: under the rules we adopt today the timeline does not start until a completed application is submitted, and there is flexibility for larger orders.[82] Thus, we expect that utilities acting diligently and in good faith will be able to conduct surveys within the prescribed 45-day period. Owners are given an additional 15 days for large orders.

25. To constitute a "request for access" necessary to trigger the timeline, a requester must submit a complete application that provides the utility with the information necessary under its procedures to begin to survey the poles. We find that pole owners must timely notify attachers of errors in an application, and may not stop the clock to correct errors in an application once it is accepted as complete,[83] as surveys that are not interrupted are more conducive to dependable timeframes. Furthermore, the timing of any such notification of deficiencies in an application must be reasonable. If the request involves attachment of facilities that are unfamiliar to the utility, engineering specifications must be established prior to submission of the application. If an application is submitted for which such engineering specifications have not been established, the pole owner must respond in a manner that is reasonable and timely under the circumstances, but in any event within 45 days.[84] We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely.

26. *Stages 2 and 3—Estimate and Acceptance*: Where a request for access is not denied, a utility must present to a requesting entity an estimate of charges to perform all necessary make-ready work within 14 days of providing its Stage-1 response—or within 14 days after the requesting entity delivers its own survey to the pole owner, as it may do if the pole owner fails to meet the timeline's Stage 1 deadline. The requesting entity may consider the estimate for 14 days after receiving it before the utility may withdraw the offer. Both offer and acceptance may be made sooner than the maximum 14 days. Estimates will not expire automatically after 14 days, but rather must be actively withdrawn by the utility. If an estimate is withdrawn by the utility, the prospective attacher must resubmit its application for attachment.

27. By adopting a 14-day estimate stage, we ensure that a utility will have a reasonable opportunity to develop a cost estimate from the survey. Such an opportunity is essential when a utility

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[79] *See* Utilities Telecom Council Comments (filed Mar. 7, 2008), App., The Problem with Pole Attachments: A White Paper at 12 (2007) (stating that, under the rule "an application must be approved or denied in writing within 45 days from the date that it is filed with the utility. The typical process involves reviewing the proposal for completeness, conducting a field survey, conducting an engineering analysis (load and clearance), estimating make-ready and construction costs, submitting the estimate to the applicant and approving the attachment.") (Utilities Telecom Council White Paper).

[80] *Id.* at 4, 12–13.

[81] *Id.* at 4, 13 (stating that, of surveys that took more than 45 days, 30% were due to the size of the project; 23% to errors in the application; 28% to backlog; and 19% to other factors).

[82] *See infra* Part III.A.2, III.A.3. Under this approach, we anticipate that missed survey deadlines will be reduced substantially, yielding higher success rates overall. Moreover, addressing these variables allows the survey stage to run without a provision for stopping the clock. *See* Sunesys Comments at 7–8 (arguing that utilities should be permitted to defer starting the clock and notify attachers of errors).

[83] *See, e.g.*, Qwest Comments at 8 (arguing that errors should stop the clock); Sunesys Comments at 7–8 (arguing that utilities should be permitted to defer starting the clock and notify attachers of errors).

[84] *See* 47 C.F.R. § 1.1403(b).

works from a requesting entity's survey rather than its own. A separate estimate stage also allows for a survey response that is independent of negotiation of terms in a master pole attachment agreement.[85] If an entity submits a complete application for a survey, the survey should proceed independently of any ongoing negotiations regarding rates, terms, and conditions of attachment. Likewise, the right of an attacher to hire a contractor if the survey deadline is missed operates independently of a licensing agreement.[86] Finally, setting fixed limits to these transactional stages enhances the predictability of the timeline.

28. We find that allowing up to 14 more days after the survey period for the preparation of an estimate is appropriate.[87] Although neither stage need last a full 14 days, we conclude that providing this additional time is useful in allowing parties to prepare or review the estimate outside of the survey and make-ready stages. Also, if an attacher is not prepared to move forward, the utility may turn its attention and resources to another project, rather than delay the project indefinitely. Indeed, the proposal to limit an attacher's review of the estimate to 14 days received no negative comment.

29. *Stage 4—Make-Ready*: Upon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready. The notice shall: (1) specify where and what make-ready will be performed; (2) set a date for completion of make-ready no later than 60 days after notification (or 105 days after notification in the case of larger orders) for attachments in the communications space, or no later than 90 days after notification (or 135 days after notification in the case of larger orders) for wireless attachments above the communications space;[88] (3) state that any entity with an existing attachment may add to or modify the attachment before the date set for completion of make-ready; (4) state that the utility may assert its right to 15 additional days to complete make-ready and that, for attachment in the communications space, the requesting entity may complete the specified make-ready itself if make-ready is not completed by the date set by the utility (or, if the utility has asserted its 15-day right of control, by the date 15 days after that completion date); and (5) state the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure. Under normal circumstances, performance of make-ready will complete the elements of the timeline that precede actual attachment.

30. As shown in Figure 1, we anticipate that adoption of a 60-day timeframe for make-ready performance in the communications space (105 days for large projects) will expedite those make-ready projects—comprising at least 20 percent of the total—that today exceed the large-order 105-day target:

[85] *See infra* Part IV.E; *see also* Florida IOUs Reply at 13 (arguing that a master agreement is needed to protect the pole owner and acquaint the attacher with the pole owner's standards, processes and application procedures); Letter from Sean B. Cunningham, Counsel, Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 at 2 (filed Jan. 27, 2011) (arguing that timeline should not commence unless the applicant has a master agreement that addresses matters including, *inter alia*, insurance, indemnification, and safety procedures).

[86] This approach is consistent with the New York model. New York Order at 3 (14 day limit). *See* Coalition Proposal (15 day limit).

[87] *See, e.g.*, Fibertech Comments at 5–6 (arguing that Connecticut's omission of additional time for estimates proves it to be unnecessary); Verizon Comments at 25–26 (arguing that 14 days would be more useful later in the timeline).

[88] As noted, the make-ready period for wireless attachments above the communications space is 90 days. *See infra* para. 33.

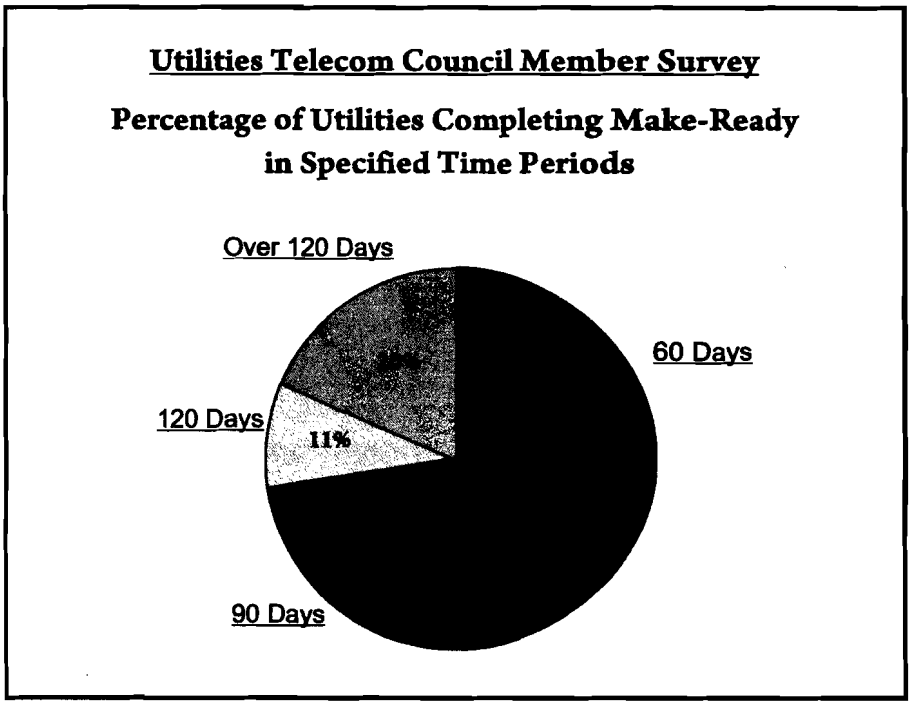

Figure 1

31. We adopt 60 days for the make-ready stage in the communications space in order to (1) synchronize make-ready with the Commission's existing rules that give entities with existing attachments 60 days to move them before a pole owner modifies a pole,[89] and (2) promote a higher success rate that attachers and their investors can depend on. Section 224(h) requires pole owners to give any entity with an existing attachment a reasonable opportunity to add to or modify its facilities before the owner modifies the pole.[90] The Commission has long interpreted "a reasonable opportunity" to mean that a "utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to removal of facilities."[91] This 60-day standard adopted in 1996 continued a Commission policy that dates back to the Commission's *First Report and Order* implementing the Pole

[89] *See infra* App. A (47 C.F.R. § 1.1422).

[90] 47 U.S.C. § 224(h) provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

[91] *See* 47 C.F.R. § 1.1403(c) (requiring a utility to provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to, *inter alia*, modifying a pole); *Local Competition Order*, 11 FCC Rcd at 16094–96, paras. 1207–09.

Attachment Act of 1978.[92] The Commission's longstanding rule appears to have influenced pole attachment expectations. No commenter challenges this well-established standard for reasonable notice.

32. Based on the record, 60 days also appears to be a workable timeframe that many utilities can meet.[93] This furthers our interest in dependability. The successful experiences of several utilities *and* attachers support the pragmatism of selecting this model. For example, Verizon reports that, when multiple parties must be sequenced to perform make-ready, 60 days are needed to design the work order and coordinate make-ready work.[94] Other utilities also estimate that they need 60 days to perform make-ready.[95] On the attachment side, TWC claims that requests for more than 200 attachments may require 60 days or more.[96] We disagree with commenters that contend we should adopt a 45-day deadline for make-ready performance because New York and Connecticut adopted that interval.[97] The record contains no data showing how often utilities in those states actually meet the 45-day deadline. Some utilities do report that they find 45 days adequate for make-ready, but only absent complicating factors.[98] On this record, it appears that 45 days may be a "best practice" for medium-sized pole attachment requests, and 30 days or less appears to be a reasonable "best practice" for small requests.[99] We decline to adopt these shorter "best practices" timeframes as rules, but we encourage utilities to maintain or improve upon these shorter timeframes when feasible. As discussed in greater detail *infra*, if existing attachers have not moved their facilities within 60 days of notification, the utility or the attacher may move the facilities for them.[100]

33. For wireless attachments above the communications space on a pole, we include an extra 30 days for make-ready for two reasons. First, these attachments generally are located in, near or above the electric space, which can raise significant safety concerns.[101] Second, the record reflects that, at

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[92] Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978) (Pole Attachment Act); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, First Report and Order, 68 FCC 2d 1585, para. 8 (1979) (*First Report and Order*).

[93] The ability to meet the 60-day make-ready period is premised on size limits to orders that would be subject to the timeline. *See infra* Part III.A.4. *See also, e.g.*, Coalition Comments at 33; AT&T Comments at 28; TWC Comments at 18. These comments respond to the 45-day make-ready period we proposed, not the 60-day make-ready period we adopt.

[94] Verizon Comments at 31 (arguing 60 days needed for pole owners to complete the engineering design, create a work order, and coordinate make-ready work with other attachers where work for multiple parties must be sequenced).

[95] *See, e.g.*, USTelecom Comments at 20; CPS Energy Comments at 9 (both arguing that 60 days are needed to perform make-ready).

[96] TWC Comments at 18 (arguing that requests to attach 200 poles or less can be filled in 45 days, but requests for more than 200 attachments may require 60 to 90 days).

[97] Fibertech Comments at 5–6 (arguing that experience in New York and Connecticut shows that a 45-day performance timeframe is sufficient).

[98] *See Further Notice*, 25 FCC Rcd at 11893, para. 40. *See, e.g.*, Idaho Power Comments at 2 (straightforward requests processed within 45 days); Florida IOUs Comments at 18–24 (45 days reasonable if limited to communications space); Oncor Comments at 23 (45 days reasonable when deadline applies to attaching entities).

[99] *See, e.g.*, TWC Comments at 18 (proposing that make-ready work for fewer than 20 poles should be complete in 30 days); Coalition Comments at 32 (proposing planning meetings for orders in excess of 25 poles); Utah Admin. Code § R746-345-3 (shorter timeframes for orders of 20 or fewer poles); NRECA Comments at 8–10 (finding that most utilities meet its orders within 30 days).

[100] *See infra* Part III.A.3.

[101] *See, e.g.*, HTI Reply at 9 (stating that siting such equipment among "active" components creates additional safety risks for workers); NY Comm'n Wireless Proceeding at 6 ("Special attention must be given to safety because (continued....)

present, there is less experience with application of state timelines to attachments at the pole top, and in those circumstances, it is appropriate to err on the side of caution.[102] Also, for reasons we discuss separately below, we follow state models that allow additional days for make-ready for large orders within a single state.[103]

34. We find that the benefit of requiring the utility to notify existing attachers of needed make-ready outweighs the relatively small burden of providing such notice. The requesting entity's interest in broad notification is typically strong, whereas a utility's additional burden in copying additional known attachers is minimal. The statute requires pole owners to notify in writing "*any* entity that has obtained an attachment so that such entity may have a reasonable opportunity to add to or modify its existing attachment."[104] When the notice requirement is triggered by a prospective attacher's acceptance of a utility's estimate, we interpret the word "any" to encompass as broad a range of attachers as is practicable, including not only cable system operators and telecommunications carriers, but also any attaching joint users or joint owners, and, if their address is known to the utility, entities with attachments that the utility believes to be unlawful.

35. Several utilities contend that they should not be required to actively manage and coordinate make-ready.[105] We agree. Utilities may fulfill their section 224(f)(1) access obligation by performing make-ready themselves, by contracting out the direction and management of make-ready, or by cooperating with existing attachers' contractors to ensure make-ready is timely. The "just and reasonable" standard in section 224(b) gives utilities the flexibility to develop and implement procedures for meeting make-ready obligations. However, the notification-in-writing requirement that we adopt is appropriate both because section 224(h) expressly requires written notification by the pole owner,[106] and because of the potential legal and practical consequences if entities with existing attachments are not properly notified.

36. *Completion by Owner*: If make-ready is not completed by the date specified in the utility's notice to entities with existing attachments, a utility, prior to the expiration of the 60-day notice period (or 105-day notice period in the case of larger orders), may notify the requesting attacher in writing that it intends to assert its right to complete all remaining work within 15 days. In such cases, the utility will have an additional 15 days to complete make-ready. If make-ready remains unfinished at the end of the 15-day extension, the attacher may assume control of make-ready at that point (Day 148 of the timeline, or Day 193 in the case of larger orders).[107] Thus, we permit a pole owner to assert its right to 15

(Continued from previous page)
such facilities could fall over onto power lines in high wind conditions or in heavy wet snow conditions resulting in power outages.").

[102] Some states with timelines apply their pole attachment rules to wireless equipment, while others do not. *Compare, e.g.*, Utah Admin. Code § R746-345 ("[T]hese rules apply to any wireless provider."), *with* NY Comm'n Wireless Proceeding at 6–7 ("[W]e will not apply the Pole Attachment Order and Policy Statement to wireless attachments.").

[103] *See infra* paras. 63–67.

[104] 47 U.S.C. § 224(h)(providing that "whenever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment").

[105] *See, e.g.*, Ameren *et al.* Comments at 11 (arguing that Commission authorization cannot mitigate other substantial liabilities to which pole owners may be exposed in resorting to such "self-help" remedies, including loss of service); Oncor Comments at 23 (stating that Oncor is not in the communication make-ready business and does not want to be); Florida IOUs Comments at 21–22 (urging the Commission to avoid putting pole owners in the untenable position of coordinating the sequence and timing of rearrangement for existing attachers).

[106] 47 U.S.C. § 224(h).

[107] *See infra* Part III.A.3.

days to complete make-ready in lieu of adopting an automatic fifth stage for "multi-party coordination" as proposed in the *Further Notice*.[108] For attachments in the communications space, if the utility does not timely assert its right to 15 extra days to perform make-ready, control of the project transfers to the new attacher immediately at the end of the 60-day period (or 105-day period in the case of larger orders), and the attacher may use a contractor to complete make-ready.[109]

37. Although the *Further Notice* proposed to adopt a fifth stage for multi-party coordination, no party supported that suggestion, and some argue that it would create needless delay.[110] Utilities also argue that they lack expertise or training to move communications wires, and would not risk the liability or legal consequences of doing so on behalf of requesting entities.[111] Nevertheless, we preserve an interval whereby any utility that chooses to use it can have exclusive control over the pole. In cases where a utility has failed to complete make-ready within the 60-day period (or 105-day period in the case of larger orders), a new attacher may hire an authorized contractor to complete make-ready, or in the case of a wireless attachment above the communications space, may invoke its complaint remedy.[112] This will ensure timely access to poles, if not by a pole owner or agent, then by the new attacher.

38. Many electric utilities object vigorously to any requirement that they must complete make-ready performance. They argue that they lack the authority or ability to control certain aspects of the make-ready process. For example, utilities claim that they cannot coordinate make-ready in the communications space, adding that, even if they had the right, they cannot be compelled to exercise it.[113] Utilities also argue that it would be unreasonable to compel utilities to move communications facilities "on demand" on behalf of requesting entities. Several utilities assert that, if they do move attachers' facilities, they must be held harmless.[114]

39. As noted above, we do not require pole owners to conduct make-ready work. Nevertheless, we find that any utility that wishes to complete make-ready should have an additional 15 days in which to do so.[115] Given the nondiscriminatory access obligation imposed on utilities in section

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[108] *See Further Notice*, 25 FCC Rcd at 11885, paras. 43–44 (proposing multi-party coordination for stage 5 of the timeline).

[109] For wireless attachments above the communications space, if the utility does not assert its right to 15 extra days prior to the running of the 90-day notification period, the attacher may file a complaint as discussed in para. 42, *infra*.

[110] *See, e.g.*, Fibertech Comments at 6–7; Sunesys Comments at 10 (both questioning the need for, and value of, a post-make-ready coordination stage).

[111] *See, e.g.*, Coalition Comments at 70–71 (arguing that electric utilities are not entitled to move municipal attachments, and can no more move communications equipment safely than communications companies can move electric equipment safely); Coalition Comments at 65–66 (arguing that if electric utility pole owners could make existing attachers move their facilities, owners would not have to resort to "double wood," *i.e.*, installation of a new pole next to shortened old pole); Verizon Comments at 39 (stating that, under joint use arrangements, Verizon has no greater control over the utility pole owner than any other attacher, and incumbent carriers cannot dictate how the utility pole owner processes applications or completes make-ready work).

[112] 47 C.F.R. §§ 1.1420(h), 1.1422.

[113] *See, e.g.*, Coalition Comments at 65–66; Oncor Comments at 25; Ameren *et al.* Comments at 10.

[114] *See, e.g.*, Ameren *et al.* Comments at 11; AT&T Comments at 32; Coalition Comments at 70–71 (all requesting indemnification and protection from liability). *But see* CPS Energy Comments at 9 (stating that it moves attachers after 30 days notice if the attacher fails to comply). We note that New York has permitted attachers to use contractors for make-ready since 2006. New York Order at 3. No commenter reports liability claims related to New York's pole attachment rules.

[115] *Further Notice*, 25 FCC Rcd at 11885, para. 44.

224(f)(1), we presume that utilities could structure attachment agreements to include provisions for transfer of facilities, or otherwise address liability or other concerns they might have in cases where they elect to perform make-ready themselves. A utility may also assert its 15-day right of control in order to add flexibility to the timeline, which several utilities cite as a concern.[116] While it would not be reasonable for a utility to exercise its 15-day right merely to delay make-ready, a utility may, for example, depending on the circumstances, use the additional 15 days to make up for weather-related delays without surrendering the project to the new attacher. If a utility is working diligently to complete make-ready when its 15 days expire, a new attacher may prefer not to interrupt it for the sake of efficiency. Otherwise, if the attachment is in the communications space, the utility must cede control of the project to the new attacher, which may use approved contractors, accompanied by a representative of the utility, to perform any remaining make-ready work.[117] Thus, the timeline and this optional 15-day stage conclude either with the utility granting access to attach (*i.e.*, in cases where make-ready has been completed) or the passing of control over make-ready to the new attacher (*i.e.*, in cases where make-ready has not been completed).

2. Scope of the Timeline

40. The timeline we adopt today—which is modeled after the timeline that has been in use in Utah— applies to all requests by telecommunications carriers (including wireless) and cable operators for attachment in the communications space on a pole. The timeline begins when an application is complete, such that the utility has been provided with the information necessary under its procedures to begin to survey the requested pole(s), including developed engineering specifications for the particular equipment to be attached. A modified form of the timeline applies to wireless attachments by telecommunications carriers and cable operators that are made above the communications space. The timeline does not apply to section 224 ducts, conduits, or rights-of-way. We affirm that completion of an initial pole agreement or "master agreement" is not a prerequisite to starting the clock on a completed application, which may have multiple attachment requests within it. Applications that are outside the scope of the timeline remain subject to the general requirement that the pole owner provide a specific written response within 45 days.

41. *Technology Neutrality.* In the *Further Notice*, the Commission sought comment on developing timelines for section 224 access other than for wired pole attachments, and on whether the wired pole attachment timeline would be appropriate for wireless pole attachments (*i.e.*, antennas and other wireless telecommunications equipment).[118] Specifically, the Commission stated that its goal was to bring regularity and predictability to attachment of wireless facilities, while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns.[119] Such predictability is important because it affords broadband providers an enhanced ability to attract investment and plan for buildout of needed

[116] *See, e.g.*, Idaho Power Comments at 12 (arguing that utilities need flexibility to retain control of relocation schedules); Qwest Comments at 6–7 (arguing timeline must be flexible enough to address realities of pole attachment process); EEI/UTC Comments at 17–18 (arguing against fixed timeline as not sufficiently flexible).

[117] Some utilities allege that facilities on some poles, such as attachments by municipalities, are not subject to section 224, and may not be moved by them or anyone else. *See, e.g.*, Florida IOUs Comments at 20–21 (arguing that governmental attachments may not be moved); Coalition Comments at 70–71 (arguing that pole owners may not move municipal attachments). The record does not indicate the extent to which governmental attachments are implicated in make-ready delays in the communications space. In any event, the ability to hire contractors need not remove every impediment to attachment to every pole to be a meaningful remedy for attachers.

[118] *Further Notice*, 25 FCC Rcd at 11887–88, paras. 52–53.

[119] *Id.* at 11888, para. 53.

infrastructure such as fiber placed closer to end-user locations, and wireless antennas used to fill in coverage areas and expand capacity.[120]

42. Upon review of the record, we conclude that it is appropriate to apply the timeline to both wired and wireless attachments.[121] We find no reasonable basis for applying a timeline disparately to wired or wireless attachments as such. Concerns in the record relate to the facts that wireless attachments are commonly located in, near, or above the electric space, and the attachment request may be for a type of equipment for which engineering specifications have not already been developed. We address those concerns by adopting two modifications to our basic timeline for wireless attachments by telecommunications carriers and cable operators that are located above the communications space. The first modification is that an extra 30 days is added for make-ready performance for wireless attachments above the communications space, to account for: (1) safety concerns related to equipment being placed in, near or above the electric space; and (2) the fact that, at present, there is less experience with application of state timelines to attachments above the communications space. The second modification to the general timeline is that the remedy for failure to meet the timeline for wireless attachments above the communications space is a complaint remedy rather than the self-effectuating contractor remedy for failure to perform timely survey and make-ready that applies to requests to attach in the communications space.[122] Based on the record, we find the self-help remedy for survey and make-ready performance would not be appropriate for attachments that generally are located in, near, or above the electric space.[123] To accommodate the unique issues facing these requests for attachment, we establish an additional 30 days after the maximum time allowed for attachment requests in the communications space—178 days total.[124]

43. We further conclude that the appropriate avenue for seeking a remedy for failure to meet the timeline for wireless attachments above the communications space is a complaint filed through the FCC's complaint procedures for unreasonable delay on the part of the utility. We also adopt a rebuttable presumption in such proceedings that access has not been provided on just and reasonable terms and conditions. In such a case, a demonstration in a complaint that the timeline has been exceeded shifts the burden to the utility to demonstrate that additional time is warranted. We find a rebuttable presumption is appropriate in this context because wireless attachers above the communications space will not be able to avail themselves of the self-help remedy we provide for attachers in the communications space. Accordingly, we expect that shifting the burden of proof to the utility will deter unreasonable delays for wireless attachments above the communications space. The remedies available in such a complaint proceeding would include mandated access within a specified time frame and in accordance with

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[120] *See, e.g.*, CTIA Comments at 2, 6 (arguing that wireless providers operate in a fast-moving, intensely competitive industry, so speedy access to poles is just as important to wireless attachers as it is to wireline attachers, if not more so); DAS Forum Comments at 20 (arguing that DAS attachments also include wired attachments that should be deployed on the same timeframe to ensure predictability and efficiency of deployment); MetroPCS Comments at 11 (stating that a timeline is appropriate to ensure a level playing field between wired and wireless providers).

[121] *See, e.g.*, T-Mobile Comments at 9 (stating that "it often takes T-Mobile as much as four months to negotiate a master agreement with a cooperative pole owner and sometimes much longer -- even as much as 18 months or more -- to negotiate with an uncooperative one"); CTIA Mar. 15 *Ex Parte* at 2 ("CTIA proposes to extend the wireline timeline for pole owners to grant physical access to wireless attachers by 30 days to 178 days total."); PCIA Mar. 15 *Ex Parte* at 1 ("Make ready for wireless pole top attachments must not exceed the Commission's proposed make ready timeline, plus an additional 30 days.").

[122] *See supra* Part III.A.3.

[123] *See, e.g.*, Oncor Comments at 44–45 (describing the problems with a contractor remedy for access above the communications space); Florida IOUs Comments at 29–31 (same); *see also infra* para. 33 (discussing attachments above the communications space).

[124] CTIA Mar. 15 *Ex Parte* at 6–7.

specified rates, terms, and conditions; substitution of just and reasonable rates, terms, or conditions for unjust and unreasonable ones; and refund of an overpayment.[125] In addition the Commission could initiate enforcement actions that could result in forfeitures.[126]

44. *Engineering Specifications for New Equipment.* The record demonstrates that wireless equipment varies greatly and at least some of it is changing rapidly.[127] In contrast, the maturity of cable and wireline telecommunications equipment has allowed utilities to develop engineering specifications and manuals to address the engineering and safety issues raised by their attachment.[128] Thus, although we do not adopt particular access provisions for wireless attachments in the communications space, we recognize that, as a practical matter, the novelty of wireless equipment both within and above the communications space may pose additional challenges. To the extent that the record evidences concerns about the reasonableness of establishing a timeline for wireless attachments, those concerns have more to do with the lack of developed engineering specifications for untested equipment than with the difficulty of performing a survey or make-ready work.[129] We agree with commenters that assert that the key difference in the process between wireline and wireless attachments lies in the initial engineering evaluation, particularly when a utility is dealing with a type of attachment for the first time.[130] Our timeline thus is fashioned to take into account special treatment of novel engineering problems that do not hinge necessarily on whether the service is wireless or wireline. Indeed, wireline equipment lacking a developed construction specification would be subject to the same approach. To the extent there are concerns that attachment of wireless facilities involves unique safety, security, or engineering issues,[131] we find that development of protocols and specifications to address those issues is substantially more appropriate than excluding all such equipment from the timeline. We note that we expect any evaluation of new types of equipment to be done on commercially reasonable terms, and in a reasonable time – in keeping with the general statutory obligation that rates, terms and conditions for pole attachment be just and reasonable – and we will monitor industry practices in this area, including through our complaint process.

45. *Ducts, Conduits, and Rights-of-Way.* We decline to adopt a timeline for access to section 224 ducts, conduits, and rights-of-way at this time.[132] Access to ducts and conduits raises different issues than access to poles,[133] and the record does not demonstrate that attachers are, on a large scale, currently

[125] *See* App. A at section 1.1410(a)–(b).

[126] *See* 47 C.F.R. § 1.80.

[127] *See, e.g.*, Oncor Comments at 33 (stating that the wireless attachments on its poles "vary greatly in the type of equipment used" and that this equipment "differs in power outlet, dimension, height, weight, antenna size, power supply, photocell, etc."); Florida IOUs Comments at 28 ("Unlike wireline attachments – which are fairly consistent from an engineering perspective – wireless antennae vary considerably in dimension, placement on the pole, vertical and horizontal space occupied, and loading profile."); Alliance Reply at 51–53 (stating that "[t]he complexity and variability of make-ready is even greater in the case of wireless attachments, due [in part] to the size, number, and variety of wireless equipment attachments").

[128] *See, e.g.*, Coalition Comments at 36, 101–02; Oncor Reply at 31.

[129] *See, e.g.*, EEI/UTC Comments at 26 (arguing that wireless attachments pose special operational and safety problems).

[130] *See, e.g.*, Florida IOUs Comments at 28.

[131] *See, e.g.*, Coalition Comments at 36 (asserting that wireless devices emit radio frequency (RF) energy that triggers exposure regulations); APPA Comments at 25; NRECA Comments at 13–14; HTI Comments at 9.

[132] *See Further Notice*, 25 FCC Rcd at 11888–89, para. 54 (seeking comment on whether to apply a timeline to ducts, conduits, and rights-of-way).

[133] *See* APPA Comments at 25; Coalition Comments at 43–45.

unable to timely or reasonably access ducts, conduits, and rights-of-way controlled by utilities.[134] We emphasize that the determination we make regarding section 224(a)(1) rights-of-way owned or controlled by a utility has no bearing on any public rights-of-way issues subject to section 253 of the Act.[135]

46. *Master Agreement not a Prerequisite to Completion of a Survey.* In the *Local Competition Order*, the Commission adopted a 45-day response rule, requiring a utility that denies access to a prospective attacher to respond in writing with specificity, delineating the reasons for the denial.[136] That rule remains in effect and applies to wireless just as it does to wireline attachments. The current 45-day response rule continues to apply to all requests for access under section 224, whether or not the request is an application subject to the timeline we adopt today, and completion of an initial pole attachment agreement or "master agreement" is not a prerequisite to starting the clock.[137] We reject the argument that surveys should not commence before an initial pole agreement or "master agreement" has been executed.[138] The Commission has never required completion of a master agreement to be a precondition of a request for access,[139] and we reaffirm that utilities may not defer the 45-day response requirement until a master agreement has been completed.[140] While an attacher may wish to investigate possible routes on the ground rather than rely only on maps, and may need access to a pole owner's specifications and application requirements in order to file a complete application, we are not persuaded that a master agreement is needed for these purposes. Also, insofar as liability concerns arise regarding damage to property or injury to persons—and it is not clear that they do during the survey stage—the parties can resolve them for purposes of a 45-day engineering analysis without negotiating every aspect of the parties' business relationship, as in a comprehensive master agreement.

47. We agree that make-ready performance does normally require an agreement to be in place between the parties. We find, however, that the engineering analysis (or any other aspect of a survey) and negotiation of rates, terms, and conditions can take place on separate tracks. Therefore, a utility may stop the clock during the estimate stage of the timeline if the parties need additional time to conclude a master agreement, but may not stop the clock during the survey stage. An attacher's right to proceed with a survey of pole availability before completion of a master pole attachment agreement can be exercised

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[134] By contrast, the record developed on the issue of timely access to poles evidences problems justifying the adoption of a pole attachment timeline. *See generally infra* Part III.A.3.

[135] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, FCC 11-59 (rel. April 7, 2011).

[136] *See Local Competition Order*, 11 FCC Rcd at 16101–02, paras. 1224–25; 47 C.F.R. § 1.1403(b) (45-day response rule).

[137] Master agreements are "private pole attachment agreements entered into between the parties in accordance with a patchwork of federal, state, and local regulations and industry standards." *Local Competition Order*, 11 FCC Rcd at 16061, para. 1126. This agreement is usually generic and is separate from the agreement to attach to specific poles. *See* Letter from Brian Regan, Government Relations Director, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 5 (filed Mar. 3, 2011).

[138] *See* Florida IOUs Reply at 13 (arguing against commencing a field survey before parties have reached a pole license agreement); Letter from Sean B. Cunningham, Counsel, Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 2 (filed Jan. 27, 2011) (Alliance Jan. 27, 2011 *Ex Parte* Letter) (arguing that a timeline should not commence unless the applicant has a master agreement that addresses matters including, *inter alia*, insurance, indemnification, and safety procedures).

[139] *See Local Competition Order*, 11 FCC Rcd at 16074, para. 1160 (stating that a utility's obligation to permit access does not depend upon the execution of a formal written attachment agreement).

[140] *Id.* The *Local Competition Order* recognized that such agreements are the norm and encouraged their continued use, subject to the requirements of section 224, and we continue to believe that is the case. *Id.*

contingent on the attacher's agreement to make payment in advance for the survey.[141] We emphasize that any negotiations regarding a pole attachment agreement must be conducted in good faith, and that dragging out negotiations on the master agreement while the clock is stopped on a particular application would not be considered reasonable.

48. We also conclude that section 1.1403(b) of our rules, which generally requires that a utility approve or deny pole access within 45 days of a request,[142] continues to apply to all requests for access under section 224, independent of any application of the timeline.[143] For example, if the requested access concerns attachment in the electric space on a pole, attachment to a duct or conduit, or attachment of equipment that requires the development of new engineering specifications, the 45-day response rule and all its terms continue to apply. Also, in contrast to the timeline survey rule, section 1.1403(b) of our rules does not distinguish pole access requests by size. Where a utility denies any request for access, the utility must explain its reasons for doing so within 45 days, in writing, with specificity, and with all supporting evidence and information, and also must explain how the information and evidence relate to insufficient capacity, safety, reliability or engineering purposes.

3. Remedy: Utility-Approved Contractors

49. Requesters need a way to obtain access to poles if a utility does not meet the deadlines we impose. We adopt the proposal in the *Further* Notice and hold that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space.[144] We require each utility to make available a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, and require that the attacher must use contractors from this list. We also seek to ensure that safety and network integrity are preserved at all costs. Thus, we require attachers that hire contractors to perform survey and make-ready work to provide a utility with an opportunity for a utility representative to accompany and consult with the attacher and its contractor prior to commencement of any make-ready work by the contractor. Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.

50. *General Right To Hire Contractors.* We concur with the Public Service Commission of New York that "it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow [a]ttachers to hire approved outside contractors."[145] The transfer of control to the new attacher, including the ability to hire contractors, is key to the effectiveness of the timeline. First, the prospect of surrendering control of the pole to an attacher may spur a utility to complete a survey or make-ready that it might otherwise not timely perform. Second, if the pole owner lacks the resources or the will to perform make-ready, the prospective attacher may pursue the project through any lawful means, including

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[141] *See* Level 3 Comments at 7 (arguing that attaching parties should have the right to proceed with the survey of pole availability before completion of a master pole attachment agreement, provided that the attaching party agrees to make payment in advance of the pole owner's standard costs for the survey); Alliance Jan. 27, 2011 *Ex Parte* Letter at 2 (asking the Commission to clarify that the utility is allowed to charge the applicant up front for the entire costs of the survey and collect such amount before commencing the survey).

[142] 47 C.F.R. § 1.1403(b).

[143] *Id.*

[144] As discussed in para. 42, *supra*, the contractor remedy does not apply to requests by wireless providers to attach outside the communications space on a pole. Rather, the remedy for a failure to meet the timeline for wireless attachments above the communications space is a complaint filed under the Commission's existing complaint procedures.

[145] New York Order at 3.